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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1012

GULF OIL CORPORATION, UNION OIL COMPANY OF CALIFORNIA, INDUSTRIAL ASPHALT, INC., AND EDGINGTON OIL COMPANY,

Petitioners,

vs.

COPP PAVING COMPANY, INC., COPP EQUIPMENT COMPANY, INC., AND ERNEST A. COPP,

Respondents.

Brief in Opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Opinions Below.

The citations to the opinions below are adequately set forth in the Petition (Pet. 2). The Opinion of the District Court is attached to the Petition as Appendix A, pages 1 through 8, and the Opinion of the Court of Appeals is attached to the Petition as Appendix B, pages 9 through 15.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition (Pet. 2).

Statement of the Case.

A. Basic Facts.[1]

The Respondents are Copp Paving Company, Inc., Copp Equipment Company, Inc., and Ernest A. Copp (hereinafter "Copp"). Copp operates a hot plant where it manufactures asphaltic concrete from hot liquid asphalt, aggregates and fillers. Copp sold asphaltic concrete to third parties (so-called "commercial sales") and also employed asphaltic concrete to construct, maintain and repair interstate highways.[2]

Petitioners, Gulf Oil Company ("Gulf"), Union Oil Company of California ("Union") and Edgington Oil Company ("Edgington") (hereinafter sometimes referred to as "the oil companies") purchased crude petroleum from foreign, interstate and local sources and operated refineries from which, among other things, liquid asphalt was produced.

(a) Gulf sold all of its liquid asphalt to Petitioner, Industrial Asphalt, Inc. ("Industrial"), Gulf's subsidiary, for further distribution in the form of liquid asphalt or for conversion by Industrial into asphaltic concrete (8 R 1572).

(b) Union sold its liquid asphalt to third parties in the western states, and it also supplied some of the liquid asphalt requirements of Sully-Miller Contracting Co. ("Sully-Miller"), Union's subsidiary, for conversion into asphaltic concrete (1 R 57).

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[1]The facts are taken from the record which was before the Court of Appeals and are cited as .... R ..... Reference to the opinions of the trial court are shown as "Pet. App. A ...." and "Pet. App. B ....".

[2]Interstate highways are part of the federal system highways described in 23 U.S.C.A., Sections 101 *et seq.*

(c) Edgington sold its liquid asphalt in California and Nevada. In Southern California it sold to Copp, Industrial and Sully-Miller among others (8 R 1826, 1914).

Petitioner, Industrial, purchased all of Gulf's supply of liquid asphalt, and together with supplies of liquid asphalt acquired from other suppliers, both inside and outside of California, distributed that liquid asphalt, in part, in a number of western states including California. Industrial also owned and operated fifty-five (55) hot plants in California, Arizona and Nevada where it manufactured and sold asphaltic concrete to third parties in competition with Copp and others, and also employed asphaltic concrete in the construction, maintenance and repair of interstate highways, in competition with Copp and others. Gulf acquired all of the capital stock of Industrial (1 R 48; 8 R 1856, 1866, 1963-1965).

Sully-Miller, a wholly-owned subsidiary of Union, purchased liquid asphalt from Union and from others, with the balance of Union's supply of liquid asphalt being distributed in the western states. Sully-Miller operated eleven (11) hot plants in Southern California, manufactured asphaltic concrete and either sold or used that asphaltic concrete for constructing, maintaining and repairing interstate highways. Union acquired all of the capital stock of Sully-Miller.[2a] (1 R 65; 8 R 1897-1898).

Both liquid asphalt and asphaltic concrete are used in connection with the construction, maintenance, surfacing, resurfacing, repairing, grading and paving of in-

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[2a]Sully-Miller is not a petitioner here although this court's disposition of the case will directly affect it.

terstate roads and highways. It was always conceded below that the liquid asphalt market was an interstate market. However, petitioners contended that because asphaltic concrete, by its very nature, cannot be transported long distances for application to roads and highways, that fact conclusively established the asphaltic concrete market as a local market not subject to any of the antitrust laws of the United States (See Pet. pp. 6-7).

B. Proceedings in the District Court.

Copp's complaint in the District Court alleged, in essence, that the petitioners, and others, entered into a combination and conspiracy to restrain and monopolize the sale of liquid asphalt, the sale of asphaltic concrete, and the business of asphaltic paving of highways and roads, including particularly interstate and federal system highways, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. 112), and that pursuant thereto, petitioners (and Sully-Miller) had obtained control of seventy-five percent (75%) of this paving business in Southern California. Copp alleged, under oath, (8 R 1716-1720) that the elements of this combination and conspiracy included, among other things, the following:

(a) The fixing of prices at which hot asphalt oil would be sold;

(b) The allocation of supplies of petroleum and petroleum products, including hot asphalt;

(c) The fixing of prices for the sale of asphaltic concrete;

(d) The acquiring of ownership and control of a substantial number of hot plants, including

more than sixty percent (60%) of all of the hot plants operated in Southern California and in Los Angeles and Orange Counties;

(e) The allocation of customers as respects hot asphalt oil and asphaltic concrete;

(f) Threatening Copp's customers to cut off supply of asphaltic concrete in areas where Copp did not operate;

(g) Buying off and coercing Copp's customers not to do business with Copp;

(h) Tying the sale of other commodities so as to induce and require asphaltic concrete purchasers not to purchase from Copp in violation of Section 3 of the Clayton Act, 15 U.S.C. Section 14;

(i) Selling hot asphalt oil and asphaltic concrete in such a manner as to discriminate in price between purchasers of such commodities of like grade and quality in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. Section 13;

(j) Selling asphaltic concrete at unreasonably low prices and at below cost in the area where Copp competed and subsidizing those unreasonably low prices by artificially maintaining prices in other areas in which Copp did not compete;

(k) That Gulf acquired all of the capital stock of Industrial in violation of Section 7 of the Clayton Act, 15 U.S.C., Section 18;

(l) That Union acquired all of the capital stock of Sully-Miller in violation of Section 7 of the Clayton Act, 15 U.S.C., Section 18.

Copp's action was transferred to the District Court for the Northern District of California and became part of the Western Liquid Asphalt cases which had been consolidated by the Panel on Multidistrict Proceedings. These Western Liquid Asphalt Cases were actions brought by a number of western states, and others, against Gulf, Union, Edgington and Industrial, and others, alleging a price fixing conspiracy in the western states with respect to liquid asphalt only (*In re* Co-ordinated Pretrial Proceedings in Western Liquid Asphalt cases, *State of Alaska v. Standard Oil of California, et al.*, Trade Cases Par. 74,733 (9th Cir. 1973).

The trial court invited separate consideration of the asphaltic concrete elements of Copp's complaint. It was stipulated that all of the substantive allegations of Copp's complaint were to be admitted for the purpose of any motion for partial summary judgment addressed to the interstate commerce issue (13 R 306). When Copp commenced discovery on the issue of the interrelationship between the conspiracy which it had alleged and the asphaltic concrete interstate commerce issue, petitioners telescoped such discovery with a stipulation "that more than a de minimis quantity of the asphaltic concrete delivered by Copp and their competitors is delivered for use on interstate highways" (Pet. App. A p. 3).

Two basic arguments were made by Copp in the District Court. The first was:

(a) That the admitted facts of the liquid asphalt-asphaltic concrete conspiracy wherein, among other things, liquid asphalt prices to Copp and others were kept high and asphaltic concrete prices in competition with Copp were held low, creating the kind of "squeeze"

condemned in *United States v. Aluminum Corporation of America, Inc.*, 148 F.2d 416 (2nd Cir. 1945) established, *per se*, both the violation of the antitrust laws and the *potential* impact on interstate commerce for jurisdictional purposes. High liquid asphalt prices, admittedly part of an interstate market, were the upper "jaw" and low asphaltic concrete prices were the lower "jaw" of the nutcracker, inevitably intertwined and clearly violative of the antitrust laws. The District Court, although precluded by Rule 56 of the Federal Rules of Civil Procedure from rejecting, on the merits, the inferences to be drawn from the admitted facts (*Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir. 1972) flatly ignored the proof.[3] Moreover, having considered that the affidavits established seventy-five percent (75%) control of the paving business in Southern California, which would obviously give the petitioners the power to exclude competition and increase prices as they pleased, the District Court was bound to

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[3] "Plaintiff Ernest Copp's affidavit is to the effect that Sully-Miller Contracting Company (Sully-Miller), a subsidiary of Union Oil Company of California (Union), and Industrial Asphalt, Inc., a subsidiary of Gulf Oil Corporation, together control 75% of the paving business in Southern California. It is claimed, and for the purposes of this order, it is assumed, that Sully-Miller and Industrial Asphalt, Inc., are given preferential prices for liquid asphalt by their parent corporations which produce asphalt and that it is as a result of this competitive advantage that they have injured plaintiffs and gained for themselves a substantial corner on the paving market in Southern California.

Defendants' dealings in asphaltic concrete bear two possible relationships to restraints of interstate commerce. It is conceivable that a monopoly with respect to a product used in interstate highways could so increase the price of the product and the subsequent cost of the highways that fewer and poorer highways would be constructed and the interstate commerce could thus be affected. There is no evidence which gives any substance to this possibility. *Cf. Uniform Oil Co. v. Phillips Petroleum Co.*, 400 F.2d 267 (9th Cir. 1968) (Pet. App. A, p. 6).

recognize the potential impact of that monopoly power on the cost of constructing, repairing and maintaining interstate highways. That power to increase the cost of materials going into interstate highways, unlawfully obtained and utilized, should have been enough, standing alone, to settle the interstate commerce jurisdiction issue (*Rasmussen v. American Dairy Association, supra*).

Moreover, a fourteen million dollar ($14,000,000.00) price increase was expressly established and this quantification of a price increase was ignored. (9 R 2047). No quantification was required at all since "in commerce" activities as respects the federal interstate highway system were established. *United States v. Bensinger,* 430 F.2d 584 (8th Cir. 1970).

(b) Copp argued that since the combination and conspiracy to restrain and monopolize the asphaltic paving of highways and roads, including particularly interstate and federal system highways, was conceded for the purpose of the motion, and since interstate highways and roads are instrumentalities of interstate commerce, *that* showing, as a matter of law, established that the condemned activities were "in commerce" and satisfied the jurisdictional requirements of Sections 1 and 2 of the Sherman Act, Sections 7 and 3 of the Clayton Act and Section 2(a) of the Robinson-Patman Act. The District Court rejected this contention and granted partial summary judgment as to all issues relating to the asphaltic concrete market (Pet. App. A, pp. 7-8).

C. Proceedings in the Court Below.

Copp was allowed an interlocutory appeal to the Court of Appeals under 28 U.S.C., Section 1292(b). That Court reversed the order of partial summary judgment (Pet. App. B, p. 15) solely upon the ground that the asphaltic concrete aspect of the combination and conspiracy alleged, since it was tied directly to interstate roads and highways, clearly involved a potential impact "in interstate commerce".

With respect to the Sherman Act, the Court noted that it had been long established in this Court's decisions that Congress in passing the Sherman Act desired to exercise the full extent of its Constitutional power in restraining trust and monopoly agreements. *United States v. Southeastern Underwriters Association,* 322 U.S. 533, 558, 559 (1944), and that, as this Court's reading of this commerce clause has expanded over time, so has its interpretation of the jurisdictional scope of the Sherman Act. See cases collected in *Mandeveille Island Farms, Inc. v. American Crystal Sugar Co.,* 334 U.S. 219, 230, 231 (1948). The Court observed that, subject to exceptions not applicable here, each holding that conduct is within the reach of Congress' Constitutional power for some other purpose was entitled to great weight in a Sherman Act case. It further noted that the decisions in *Overstreet v. North Shore Corp.,* 318 U.S. 125 (1943); *Allstate Construction v. Durkin,* 345 U.S. 13 (1953) and *Mitchell v. S. W. Vollmer & Co.,* 349 U.S. 427, 429 (1955) had established that for purposes of the Fair Labor Stand-

ards Act, 29 U.S.C., Sections 201 *et seq.*, vehicular roads were instrumentalities of interstate commerce, that persons repairing them were "engaged in commerce", that those engaged in the local production of a road surfacing mixture for local use in an interstate highway were covered, and that the test was "whether the work is so directly and vitally related to the functioning of an instrumentality of interstate commerce as to be, in practical effect, a part of its rather than isolated local activity." Adhering to the application of those principles in *City of Fort Lauderdale v. East Coast Asphalt Corp.*, 329 F.2d 821 (5th Cir.), cert. den. 379 U.S. 900 (1964), the Court below held that if highway builders and suppliers are "in commerce" because of their close relationship with an instrumentality of interstate commerce for labor relations purposes, they are in commerce for the regulation of price fixing and monopolization particularly where the allegation and proof is as to activities involving the illegal manipulation of the very costs and products which put those same businesses "in" interstate commerce for purposes of the Fair Labor Standards Act.

Finally, the Court held "that the reach of Congress' power for Sherman Act purposes is no shorter than it is for any other purposes" (Pet. App. B, p. 13).

With respect to the paragraph in Copp's allegations relating to Union's illegal acquisition of all of the capital stock of Sully-Miller, in violation of Section 7 of the Clayton Act, 15 U.S.C., Section 18, it should be noted that Section 7 prohibits the acquisition by a corporation "engaged in commerce" of all or any part of the capital stock of any other corporation engaged also "in commerce" *where in any line of commerce in any section*

of the country the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly. . . ." (emphasis supplied). The Court below noted that the portion of Section 7 of the Clayton Act, italicized above, was in no way involved in the proceedings at the trial court level or the Court of Appeals. That issue is substantive not jurisdictional. The Court said "it is not necessary for a plaintiff to prove his whole case in order to give the courts jurisdiction to hear it." (Pet. App. B, p. 15).[4] Since Union was, without dispute, engaged in commerce (importing and refining petroleum and selling liquid asphalt) and Sully-Miller was engaged "in commerce" by manufacturing and using asphaltic concrete in the construction and repair of interstate roads and highways, jurisdiction as respects this claim was clearly established.

As respects Copp's allegation of the violation of Section 3 of the Clayton Act (15 U.S.C., Section 14), that statute prohibited, in substance, any person "engaged in commerce, in the course of such commerce . . ." to sell goods on the condition that the purchaser would not deal in the goods of a competitor. Since Industrial is "engaged in commerce" (purchasing liquid asphalt and selling it in the western states, manufacturing asphaltic concrete for sale to third parties and using asphaltic concrete in the construction and maintenance of interstate roads and highways) and since the tie-in sales of asphaltic concrete were in the course of "such

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[4]It is equally true of course that the "effect" provisions of Section 3 of the Clayton Act, 15 U.S.C., Section 14 and Section 2(a) of the Robinson-Patman Act (15 U.S.C., Section 13(a)) were not and are not in issue as respects the question of jurisdiction.

commerce", a clear showing of the interstate commerce jurisdictional requirements of that Act was established.

In the allegations of Copp's complaint as respects violation of the Robinson-Patman Act, it was alleged that Industrial and Sully-Miller sold asphaltic concrete at unreasonably low prices, and at or below cost, in the areas in which they competed with Copp and subsidized said prices by artificially maintaining prices in other areas in which Copp did not compete, and that these parties discriminated in price in the sale of asphaltic concrete between purchasers of such commodities of like grade and quality (8 R 1716-1720). In substance, the Robinson-Patman Act prohibits any person "engaged in commerce in the course of such commerce . . . to discriminate in price . . . where either or any of the purchases involved in such discrimination are in commerce. . . ." The Court of Appeals held that the sale of asphaltic concrete by Industrial for use in the construction, maintenance and repair of interstate roads and highways was a sale "in commerce" within the meaning of the Robinson-Patman Act. The Court's rationale was simple. It said "We see no reason why sales which are 'in commerce' because of their nexus with an instrumentality of interstate commerce must also satisfy a state line test of 'in commerce' ". It noted that the fact that Section 7 of the Clayton Act, Section 3 of the Clayton Act and Section 2(a) of the Robinson-Patman Act were intended to supplement the purpose and effect of the Sherman Act, supports a uniform interpretation of the "in commerce" requirement present in all three Acts (Pet. App. B. p. 14).

ARGUMENT.

Petitioners Have Not Demonstrated Any Conflict Between the Decision Below and the Decision of Any Other Court as Respects the Sherman Act Issues, and the Decision Below Is Clearly in Accord With the Applicable Decisions by This Court.

Petitioners assert that the decision below is in conflict with the following cases:

Fifth Circuit:

Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co., 469 F.2d 416 (1972);

Littlejohn v. Shell Oil Company, 483 F.2d 1140 (1973, *en banc*);

Sixth Circuit:

Willard Dairy Co. v. National Dairy Prods. Co., 309 F.2d 943 (1962), cert. den. 373 U.S. 934 (1963);

Seventh Circuit:

Mayer Paving and Asphalt Co. v. General Dynamics Corp., ... F.2d ...., 1973-2 Trade Cases Par. 74,719 (Oct. 1, 1973);

Borden Co. v. Federal Trade Commission, 339 F.2d 953 (1964);

Tenth Circuit:

Belliston v. Texaco, Inc., 455 F.2d 175 (10 Cir.), cert. den. 408 U.S. 928 (1972).

Littlejohn v. Shell Oil Company, Willard Dairy Co. v. National Dairy Products Co., Mayer Paving and Asphalt Co. v. General Dynamics Corp. and *Borden Co. v. Federal Trade Commission, supra,* are not

Sherman Act cases at all. Each involves alleged violations of the Robinson-Patman Act only. In *Belliston v. Texaco, Inc., supra,* the discussion of the Sherman Act issue does not contain a single word relating to interstate commerce. Thus, five out of the six allegedly conflicting cases have no relevance whatsoever to the Sherman Act commerce issue.

In *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.,* 469 F.2d 416 (1972), a sand and gravel company, Rosemound, operating in Louisiana, asserted that two Louisiana companies combined to interfere with the sand and gravel output requirements agreement which Rosemound had arranged with a large construction company. The issue before the Court of Appeals was whether the trial court properly granted a motion to dismiss under 12(b)(1) of the Federal Rules of Civil Procedure. The court noted that "the complaint contains only the barest conclusory statement of jurisdiction. . . ." Thus, fundamentally, the *Rosemound* decision was a pleading case in which the plaintiff failed to plead the essential allegations necessary to show jurisdiction.[5]

Inherent in petitioners' argument as to the Sherman Act issue is simply a flat rejection of the holding by

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[5]Petitioners' reliance on Footnote 1 of this pleading decision by the Court of Appeals is clearly misplaced. In the Trial Court Opinion, 30 Fed. Supp. 549, that court held that the sand and gravel which were to be "manufactured into mattresses" and used on the banks of the Mississippi River was solely for the purpose of protecting Louisiana land from eroding (330 Fed. Supp. 549, 554). The footnote reference in the decision by the Court of Appeals which makes reference to an alleged claim that this so-called "mattress" was floated down the Mississippi and placed on its bed is directly contrary to the finding of fact by the trial court. Moreover, since the decision affirmed an order on a motion to dismiss, the factual references by the Court of Appeals are clearly dicta.

this Court in *United States v. Southeastern Underwriters Association*, 322 U.S. 533, 558, 559 (1944) that in adopting the Sherman Act Congress desired to exercise the full extent of its Constitutional power in restraining trust and monopoly agreements. It needs no erudition to show that the words restraint of "trade or commerce among the several states or with foreign nations" contained in Sections 1 and 2 of the Sherman Act are lifted bodily from Article I, Section 8 of the Constitution. This Court's decisions mean that this fact was no accident.

Petitioners never make the argument that Congress does not have the power to protect the construction, maintenance and repair of the federal system of interstate highways from price fixing and monopolization. That argument, if it were made, would have failed in the days of *Gibbons v. Ogden* (9 Wheat. 1, 6 L.Ed. 23 (1824)), and it must fail now.

Moreover, the decision of the Court below can be sustained on two alternative grounds not considered in the opinion.

1. The trial court acknowledged evidence in the record that the petitioners controlled seventy-five percent (75%) of the paving business in Southern California and had gained for themselves "a substantial corner on the paving market in Southern California". It further acknowledged that "it is conceivable that a monopoly with respect to a product used in interstate highways could so increase the price of the product and the subsequent cost of the highways that fewer and poorer highways would be constructed and that interstate commerce could thus be affected" (Pet. App. A, p. 6).

Although the trial court said "there was no evidence which gives substance to this possibility" this statement was a complete *non sequitur*. Monopoly power is defined as the power to exclude competition and to raise prices, and it was expressly alleged and admitted in this action. Certainly in these times no oil company would contend that combined monopoly power to raise prices cannot result in an unreasonable increase in prices. Since the only issue to be determined in a jurisdictional sense is the *potential* affect on interstate commerce (*Rasmussen v. American Dairy Association*, 472 F.2d 517 (9th Cir. 1972)), the proof conceded by the trial court was patently sufficient to establish jurisdiction.[6]

2. Secondly, the complaint alleged, and it was admitted for the purpose of the proceeding below, that the liquid asphalt suppliers fixed their prices high to Copp and kept those prices high so that Industrial and Sully-Miller, who obtained preferential prices from their parent oil companies, could eliminate competition at the asphalt paving level. This classic price squeeze resulting here from conspiracy between all the petitioners was condemned, even as to a single seller, is a violation of Section 2 of the Sherman Act in *United States v. Aluminum Company of America*, 148 F.2d 416, 438 (2nd Cir. 1945). Since a conceded interstate con-

[6]The District Court had no power on a motion for partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure to make any finding of fact. The court's consideration and rejection of the evidence constituted, in effect, such a finding of fact. Monopoly with respect to asphaltic concrete surely could increase the price of the product and the cost of highways so that fewer and poorer highways could be constructed or interstate highways could suffer from reduced repair expenditures which would adversely affect interstate traffic in that manner. Since "potential affect", not actual effect, was the sole issue, the district court had no power to reject the showing.

spiracy as to liquid asphalt was combined with an asphaltic concrete conspiracy to eliminate competition and create a monopoly, the fact of the interstate liquid asphalt conspiracy, standing alone, was clearly sufficient to establish jurisdiction under the Sherman Act.

Petitioners Have Cited No Case Which Conflicts With the Decision Below as to the Issue of Commerce as Applied to Section 7 of the Clayton Act or Section 3 of the Clayton Act.

Not one of the six decisions cited by petitioners on page 9 of the their brief creates any conflict whatsoever with the decision below as to the commerce requirements of Section 7 of the Clayton Act or Section 3 of the Clayton Act.

There is no reference, even by inference, to Section 7 of the Clayton Act in any of the opinions, and the facts in those opinions nowhere show any "acquisition" whatsoever.

In the *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.* case, *supra,* the court states: "As found by the trial court, this failure of any party to have any interstate business disposes of the Clayton Act . . . claims". No provision of the Clayton Act is cited. Moreover, as noted above, the opinion is a pleading decision, *i.e.,* it sustained an order to dismiss under Rule 12(b)(1). Thus, any discussion of "facts" is clearly dicta.

Union's acquisition of Sully, a company which operates eleven (11) hot plants and participated in the monopolization of the use of asphaltic concrete for constructing and maintaining interstate highways in Southern California is clearly an acquisition of a corpora-

tion "in commerce". See *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). Similarly, sales by Industrial (or Sully) of asphaltic concrete to those who maintain, construct and repair interstate highways on condition that they will not do business with Copp, a competing supplier of asphaltic concrete and interstate highway contractor, constitutes sales "in the course of such commerce" within the meaning of Section 3 of the Clayton Act. See *Standard Fashion Co. v. Magrane Huston Co.*, 258 U.S. 346 (1922).

Discriminatory Sales of Asphaltic Concrete for Use in Interstate Roads and Highways Are Sales "in Commerce" Within the Meaning of Section 2(a) of the Robinson-Patman Act—15 U.S.C., Section 13(a).

Petitioners make their most elaborate and vigorous attack upon the decision below as it applies to Copp's Robinson-Patman Act claims. It is not inaccurate to state that the Petition attempts to bootstrap its Robinson-Patman Act arguments into Sections 3 and 7 of the Clayton Act and Sections 1 and 2 of the Sherman Act.

Although five of the decisions cited by petitioners at page 9 of their Petition hold that in the customary case at least one sale across state lines is required for jurisdictional purposes under the Robinson-Patman Act, none of these decisions demonstrate consideration of the issues tendered by the facts of the instant case. The showing made here is that the product involved and the sales thereof are "so directly and vitally related to the functioning of an instrumentality of interstate commerce

as to be, in practical effect, a part of it rather than isolated local activity" is not repeated in any case cited in the Petition.[7]

If the supplying of materials for the use in the construction and maintenance of interstate roads and highways is "in commerce" then there can be no dispute that Industrial was "engaged in commerce" when "in the course of such commerce" it made discriminatory sales. Petitioners assert that the only permissible test as respects sales "in commerce" is the crossing state lines test. That extreme position is patently without authority.

Petitioners' citation of *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349 (1941) does not enhance their argument. That decision related to an "affect on commerce" issue and has been overruled. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1947).

It should be noted that Copp's complaint alleges discriminatory sales in asphaltic concrete for use in interstate highways as an element of a combination and conspiracy in violation of Sections 1 and 2 of the Sherman Act. Patently, such discrimination, *i.e.*, selling in competition with Copp at prices lower than sales elsewhere, would have the effect, as intended, to eliminate

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[7]Neither the decision of the Court of Appeals in *Rosemound Sand and Gravel Co. v. Lambert Sand and Gravel Co.*, 469 F.2d 416, or the decision of the Trial Court at 330 Fed. Supp. 549 even hints at any facts showing discriminatory sales. In *Mayer Paving & Asphalt Co. v. General Dynamics Corp.* (1973), 2 Trade Cases, Par. 74,719 (7th Cir.), no facts are stated which show any connection with interstate roads and highways and none of the arguments or decisions relied upon by the Court below are considered. The mere allegation that Mayer Paving & Asphalt Co. is a "paving company" does not permit the conclusion that it is engaged in the business of using asphaltic concrete to construct, maintain and repair interstate highways.

Copp as a primary line competitor and to enhance the monopoly power of the petitioners in Southern California's interstate highway paving market. The direct and substantial federal interest in protecting instrumentalities of interstate commerce and the costs at which these instrumentalities are built and maintained fully justifies an interpretation of the Robinson-Patman Act to encompass sales in connection with that market. As the Court noted below, the fact that the Robinson-Patman Act, Section 7 of the Clayton Act and Section 3 of the Clayton Act were intended to supplement the intent and purpose of the Sherman Act supports a uniform interpretation of the "in commerce" requirement present in all three Acts.

Conclusion.

Petitioners' closing comment is that "the cause of federal antitrust enforcement is not forwarded by converting local squabbles into federal cases" (Pet. p. 23). We respond that the cause of federal antitrust enforcement is indeed compromised by fragmenting an interstate highway system into segments of cement and labelling the segments "local", and thereby seeking to reverse *Gibbons v. Ogden,* 9 Wheat. 1 (1824).

We respectfully submit the Petition should be denied.

Dated at Los Angeles, California, this 14th day of February, 1974.

Respectfully submitted,

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